

1 UNITED STATES DISTRICT COURT
23
4 DISTRICT OF NEVADA
56 SHANNON CARTER,
78 Plaintiff,
9v.
1011 RENEE BAKER, *et al.*,
1213 Defendants.
1415 3:16-cv-00481-MMD-VPC
1617 **REPORT AND RECOMMENDATION**
OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion to dismiss (ECF No. 18). Plaintiff opposed (ECF No. 20), and defendants replied (ECF No. 22). For the reasons stated below, the court recommends that defendants' motion to dismiss (ECF No. 18) be denied in part and granted in part, as detailed below.

15 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY
16

Shannon Carter ("plaintiff") is an inmate in the custody of the Nevada Department of Corrections ("NDOC"), incarcerated at Ely State Prison ("ESP") at all times relevant to this action. (ECF No. 6 at 1.) Pursuant to 42 U.S.C. § 1983, plaintiff brings a civil rights claim against NDOC Director James G. Cox, Deputy Director Sheryl L. Foster, ESP Warden Renee Baker, ESP Associate Warden Michael Fletcher, and ESP Associate Warden Harold M. Byrne. (*Id.*)

Plaintiff's alleges generally that from October 28, 2014 through July 27, 2015, he was housed in a twenty-three-hour lockdown unit at ESP. (*Id.* at 2.) According to plaintiff, ESP does not provide inmates housed in the lockdown unit with physical access to the law library, nor does ESP provide these inmates with persons trained in the law to assist them. (*Id.*) Instead, it is ESP's

1 policy¹ that inmates housed in the lockdown units must use a “paging system,” which requires
 2 inmates to list an exact citation and specific case number to access legal materials. (*Id.*)

3 In Count I, plaintiff claims that the use of the paging system as his sole means to access
 4 legal materials while he was in the lockdown unit violated his First Amendment right to access the
 5 courts. (*Id.* at 3.) During that time, the paging system restricted his ability to locate and research
 6 case law related to his direct criminal appeal to the Nevada Supreme Court. (*Id.*) In turn, the paging
 7 system “impeded and hindered” plaintiff from “appropriately” raising a breach of plea and plain
 8 error argument, which he asserts he would have been able to prove if he had access to a “reasonable
 9 amount of research and case law.” (*Id.*) The paging system also prevented plaintiff from
 10 “appropriately” raising his actual innocence claim to the Nevada Supreme Court on direct appeal.
 11 (*Id.* at 4.)

12 Additionally, in Count II, plaintiff claims that ESP’s law library policy for inmates held in
 13 Unit 8(B) violated his First Amendment Right to access the courts. (*Id.* at 6.) According to
 14 plaintiff, he was relocated from the twenty-three-hour lockdown unit to ESP’s Unit 8(B) on July
 15 27, 2015 up until November 13, 2015. (*Id.* at 5.) Unlike the lockdown unit, ESP permitted inmates
 16 in Unit 8(B) to physically access the law library. (*Id.*) However, this access was restricted to three
 17 hours at a time, one time per week, and inmates were not otherwise permitted to receive any legal
 18 material throughout the week. (*Id.*) Inmates with urgent needs were not permitted access to the
 19 law library or provided any other means to access the law library before their assigned time. (*Id.*)
 20 This limitation on the use of the law library prevented plaintiff from filing a timely and meaningful
 21 response to an order to show cause in his federal post-conviction habeas case, and consequently,
 22 his case was dismissed. (*Id.* at 6.)

23 With respect to the involvement of the named defendants, plaintiff alleges the following:
 24 Cox knew about ESP’s law library issues through multiple grievances and lawsuits. (*Id.* at 7.)
 25 Foster knew about the law library issues because she denied grievances and upheld policies
 26

27 ¹ While much of plaintiff’s complaint contains passively constructed sentences that fail to identify the actor
 28 responsible for the alleged violations, plaintiff makes clear on page six that he is challenging ESP “law library
 policies” that restricted his access to legal materials. (ECF No. 6 at 6.)

1 supporting the paging system. (*Id.*) Finally, Baker, Fletcher, and Byrne supported and enforced
 2 the law library policies directly. (*Id.*) Plaintiff sues Cox in his individual and official capacity, and
 3 sues the remaining defendants in their official capacities. He seeks prospective injunctive relief to
 4 remedy ESP's allegedly unconstitutional law library policy, and "such other relief as it may appear
 5 that plaintiff is entitled." (*Id.* at 8.)

6 On June 6, 2017, the District Court screened plaintiff's complaint and determined that he
 7 could proceed with his Count I and Count II claims that defendants denied his right of access to the
 8 courts. (ECF No. 5.) Plaintiff's filed a motion to dismiss (ECF No. 18), plaintiff opposed (ECF
 9 No. 20), and plaintiff replied (ECF No. 22). This report and recommendation follows.

10 **II. LEGAL STANDARD**

11 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 12 provided for in Federal Rule of Civil Procedure 12(b)(6). The ruling is a question of law. *N. Star*
 13 *Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 580 (9th Cir. 1983). The court is to grant dismissal
 14 when the complaint fails to "state a claim for relief that is plausible on its face[,]" *Bell Atl. Corp.*
 15 *v. Twombly*, 550 U.S. 544, 570 (2007), or fails to articulate a cognizable legal theory, *Taylor v.*
 16 *Yee*, 780 F.3d 928, 935 (9th Cir. 2015). When analyzing a motion under Rule 12(b)(6), courts
 17 accept as true all well-pled factual allegations, set aside legal conclusions, and verify that the
 18 complaint states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). While
 19 detailed factual allegations are not necessary, the complaint must offer more than "a formulaic
 20 recitation of the elements of a cause of action," *Twombly*, 550 U.S. at 555, and include sufficient
 21 facts "to give fair notice and to enable the opposing party to defend itself effectively," *Starr v.*
 22 *Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). In conducting the dismissal analysis, the complaint is
 23 construed in a light most favorable to the plaintiff. *Chubb Custom Ins. Co. v. Space Sys./Loral*
 24 *Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). Moreover, the court takes particular care when reviewing
 25 the pleadings of a *pro se* party, for a more forgiving standard applies to litigants not represented
 26 by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010).

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 28

III. DISCUSSION

A. Civil Rights Claims Under § 1983

42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)). The statute “provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights[,]” *Conn v. Gabbert*, 526 U.S. 286, 290 (1999), and therefore “serves as the procedural device for enforcing substantive provisions of the Constitution and federal statutes,” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Claims under § 1983 require a plaintiff to allege (1) the violation of a federally-protected right by (2) a person or official acting under the color of state law. *Warner*, 451 F.3d at 1067. Further, to prevail on a § 1983 claim, the plaintiff must establish each of the elements required to prove an infringement of the underlying constitutional or statutory right.

B. Eleventh Amendment

Defendants contend that plaintiff's claims for damages brought against defendants in their official capacities should be dismissed under the Eleventh Amendment. (ECF No. 18 at 3.) Plaintiff counters that he never requested monetary damages and, therefore, defendants' argument is without merit. (ECF No. 20 at 2.). In response, defendants point to plaintiff's request for "such other relief as it may appear that plaintiff is entitled," and appear to ask the court to limit this request for relief to injunctive and declaratory relief only. (ECF No. 22 at 2; *see* ECF No. 6 at 8.) While this language is broad, it is self-limiting. Plaintiff does not explicitly request damages from defendants sued in their official capacities, nor is plaintiff "entitled" to damage liability from such defendants. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007). Therefore, the court recommends that defendants' motion to dismiss plaintiff's official capacity claims for damages be denied as there are no such claims before the court.

1

1 **C. Personal Participation**

2 In his complaint, plaintiff alleges that “all defendants in the instant action are aware of
 3 and/or the direct cause of and/or support and enforce these policies under color of state law.” (ECF
 4 No. 6 at 6.) Defendants contend that plaintiff’s claim against defendants must be dismissed
 5 because plaintiff fails to allege that defendants personally participated in violating plaintiff’s First
 6 Amendment right of access to the courts. (ECF No. 18 at 3-4.)

7 “Government officials may not be held liable for the unconstitutional conduct of their
 8 subordinates under a theory of *respondeat superior*.” *Iqbal*, 556 U.S. at 676. Like any other
 9 governmental employee, an official acting in a supervisory capacity may be liable if he or she was
 10 personally involved in a constitutional deprivation, or there is a sufficient causal connection
 11 between his or her wrongful conduct and the deprivation. *Henry A. v. Willden*, 678 F.3d 991,
 12 1004–05 (9th Cir. 2012) (citing *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011)). For a supervisor,
 13 such wrongful conduct may include ““action or inaction in the training, supervision, or control of
 14 his [or her] subordinates . . .”” *Id.* (quoting *Watkins v. City of Oakland*, 145 F.3d 1087, 1083 (9th
 15 Cir. 1998)). The causal link must be specifically alleged; vague and conclusory allegations
 16 concerning the involvement of officials in civil rights violations are not sufficient. *See Ivey v.*
 17 *Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982); *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir.
 18 1979).

19 Here, plaintiff’s claim against Cox in his personal capacity must fail because he alleges only
 20 that Cox knew or should have known about the constitutional issues with ESP’s law library policy.
 21 He does not allege that Cox, as NDOC Director, implemented, enforced, or ratified ESP’s law
 22 library policy, or otherwise personally participated in denying plaintiff access to the courts. Rather,
 23 it appears that plaintiff impermissibly seeks to hold Cox personally liable simply by virtue of his
 24 duties as an NDOC supervisor. Accordingly, the court recommends that plaintiff’s claims against
 25 Cox in his personal capacity be dismissed.

26 However, a plaintiff is not required to allege the personal involvement of a state official
 27 when the plaintiff attacks a state policy on federal grounds; all that is required is that the complaint
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1 name an official, in his official capacity, who could appropriately respond to a court order
 2 on injunctive relief should one ever be issued. *AZ Students' Ass'n v. AZ Bd. of Regents*, 824 F.3d
 3 858, 865 (9th Cir. 2016) (holding district court should have granted plaintiffs leave to amend to
 4 bring challenge to Arizona Board of Regents' ("ABOR") unconstitutional policy against *officers of*
 5 *ABOR* in their official capacities, rather than ABOR itself); *see Hoptowit v. Spellman*, 753 F.2d 779
 6 (9th Cir. 1985) (permitting an official capacity, injunctive relief suit to continue against an official's
 7 successors despite objection that the successors had not personally engaged in the same practice
 8 that had led to the suit); FED. R. CIV. P. 25(d). "To bring such a claim, the plaintiff must identify a
 9 practice, policy, or procedure that animates the constitutional violation at issue." *AZ Students'*
 10 *Ass'n*, 824 F.3d 865; *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

11 Plaintiff seeks to enjoin two allegedly unconstitutional ESP policies regarding inmate
 12 access to legal materials—the "paging system" that inmates in twenty-three-hour lockdown are
 13 relegated to, as well as the limited once-a-week access that ESP provides inmates in Unit 8(B).
 14 (ECF No. 20 at 2.) In his response to defendants' motion to dismiss, plaintiff specifies that he is
 15 challenging NDOC Administrative Regulation 7.22. (*Id.*) The court takes judicial notice of NDOC
 16 Administrative Regulation 100, which states that the NDOC Director and Deputy Directors, along
 17 with other officials, "will be responsible for policy development" and that the Director "make[s]
 18 the final decision regarding all policies," including the Administrative Regulations. NEV. DEPT. OF
 19 CORR., ADMINISTRATIVE REGULATION 100 at 1 (2016). Without venturing into a more fact-
 20 intensive inquiry that would trigger the notice requirements of *Klingele v. Elkenberry*, 849 F.2d
 21 409 (9th Cir. 1988), the court finds that NDOC Deputy Director Sheryl Foster is appropriately
 22 named as a defendant in her official capacity for purposes of implementing any prospective
 23 injunctive relief the court may grant. The same is true of the NDOC Director; however, the court
 24 must order the substitution of former NDOC Director James Cox for current NDOC Director James
 25 Dzurenda.² FED. R. CIV. P. 25(d).

27 2 The court takes judicial notice that James Dzurenda currently holds the office of NDOC
 28 Director. *See* <http://doc.nv.gov/About/Director/Home/>

1 Further, plaintiff alleges that Baker, Fletcher, and Byrne enforced the allegedly
2 unconstitutional law library policies. By the same token, they necessarily must be able to refrain
3 enforcing these policies should the court grant plaintiff's requested injunctive relief; therefore, they
4 are appropriately named as defendants in their official capacities. Moreover, plaintiff's allegation
5 that Baker, Fletcher, and Byrne enforced the unconstitutional law library policies is sufficient to
6 satisfy the personal participation requirement defendants rely on in their motion to dismiss. *See Ex*
7 *parte Young*, 209 U.S. 123, 161 (1908) (attorney general's enforcement of unconstitutional state
8 statute made him a proper party to suit).

9 Defendants attempt to apprise the court of their respective job duties and personal
10 involvement, (ECF No. 22 at 3), but whether defendants are actually able to appropriately respond
11 to the court's order on injunctive relief is an evidentiary matter that the court will not explore further
12 at the motion to dismiss stage. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994) (with the
13 exception of materials subject to judicial notice, district court may not consider materials outside
14 the complaint and the pleadings); *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1071 (9th Cir.
15 2012) ("The scope and content of a [litigants] job responsibilities is a question of fact.").
16 Accordingly, the court recommends that defendants' motion to dismiss be denied to the extent that
17 it seeks to dismiss all defendants in their official capacities, but granted as to James Cox in his
18 personal capacity for lack of personal involvement.

19 **IV. CONCLUSION**

20 For good cause appearing and for the reasons stated above, the court recommends that
21 defendants' motion to dismiss (ECF No. 18) be granted as to Cox in his personal capacity because
22 plaintiff fails to allege that Cox personally participated in denying plaintiff access to the courts.
23 The court further recommends that defendants' motion to dismiss (ECF No. 18) be denied as to
24 remaining defendants in their official capacities because they may enforce the prospective
25 injunctive relief plaintiff seeks, should the court find in plaintiff's favor. Finally, the court
26 recommends that current NDOC Director James Dzurenda replace Cox in this proceeding, as
27 required by Federal Rule of Civil Procedure rule 25(d).

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled “Objections to Magistrate Judge’s Report and Recommendation” and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that defendants' motion to dismiss (ECF No. 18) be **GRANTED** as to James Cox in his personal capacity;

IT IS FURTHER RECOMMENDED that defendants' motion to dismiss (ECF No. 18) **DENIED** as to all remaining defendants;

IT IS FURTHER RECOMMENDED that Cox, to the extent he is sued in his official capacity, be replaced by current NDOC Director James Dzurenda as a defendant in this action.

DATED: May 3, 2018.

for James Dzurenda as a defendant in this action.

Valerie P. Poole

UNITED STATES MAGISTRATE JUDGE